



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 26, 1995

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Legal Affairs Division
Texas Department of Criminal Justice
P.O. Box 99
Huntsville, Texas 77342-0099

OR95-218

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 29430.

The Texas Department of Criminal Justice (the "department") received a request for, among other things, the certified payroll records of Cobb Mechanical, Inc., a subcontractor involved in two construction projects for the department. The department has provided most of the information to the requestor except for the certified payroll records. You claim that the requested payroll records are not subject to the Open Records Act and in the alternative that the information is excepted from required public disclosure under sections 552.101, 552.104 and 552.110 of the Government Code.

As a threshold issue, we address your contention that the requested information is not "public information" subject to the Open Records Act. Gov't Code § 552.021. You contend that the requested information is not subject to the act because "[i]t is private and proprietary information in the possession of a private person," and because "[t]he information is not created for the governmental body, . . . but rather for the benefit of the contractor." Section 552.021 of the Government Code provides in pertinent part:

(a) Information is public information if, under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Thus, the Open Records Act will apply to the payroll records if they constitute information "collected, assembled, or maintained" by or for the department within the above provision.

Article 5159a, V.T.C.S., provides that laborers, workmen, and mechanics employed by or on behalf of the state of Texas shall be paid "[n]ot less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed." V.T.C.S. art. 5159a, § 1. The contractor and each subcontractor is required to keep a record of the actual per diem wages paid to each worker employed on the project; this record "shall be open at all reasonable hours to the inspection of the public body awarding the contract, its officers and agents." *Id.* § 3; *see id.* § 5 (misdemeanor penalty for non-compliance with statute). The department does not have possession of the records, but it may inspect the payroll information pursuant to this provision of article 5159a, V.T.C.S. The payroll information is not information "collected, assembled, or maintained... by" the department within section 552.021(a)(1).

We next consider whether it is the kind of public information described by section 552.021(a)(2) of the Government Code: information "collected, assembled, or maintained... for a governmental body and the governmental body owns the information or has a right of access to it." The provision now codified as 552.021(a)(2) of the Government Code was added to the Open Records Act in 1989. Acts 1989, 71st Leg., ch. 1248, § 9, at 5023. Open Records Decision No. 558 (1990) interpreted the language now codified as section 552.021(a)(2), stating as follows:


Prior decisions of this office have recognized that a governmental body may contract with a consultant or independent contractor to prepare information for its use in the conduct of official business. See, e.g., Open Records Decision No. 192 (1978). On occasion, the independent contractor has maintained his report and underlying data in his own office, making it available for the governmental body to use without actually having physical custody of the records itself.... Where the contractor has prepared information on behalf of a governmental body and makes it available to the governmental body, the information has been held to be subject to the Open Records Act, even though it is not in the governmental body's physical custody....

The language added to section 3(a) [by the 1989 amendment] codifies these prior decisions regarding information prepared for a governmental body.

Open Records Decision No. 558 (1990) at 2. In concluding that information held for a university by its consultant was subject to the act, this office stated that "the consultant must have acted as an agent of the university in collecting the information." Open Records Decision No. 462 (1987) at 4; *see also* Open Records Decision No. 585 (1991) (discussing agency relationship between governmental body and consultant). In this case, the contractor and subcontractor did not prepare payroll records as agents of the department, but in performance of duties imposed upon them by article 5159a, V.T.C.S.¹ The state's inspection right does not convert the private company's records into public records subject to the act. Accordingly, the requested payroll information is not information subject to the act. The department, therefore, need not provide the records to the requestor. Of course, if the department makes copies of the subcontractor's payroll records or takes notes about them in performing its duties under article 5159a, V.T.C.S., those documents will be subject to the act. Because we conclude that the payroll information is not subject to the Open Records Act, we do not address your arguments under sections 552.101, 552.104, and 552.110.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/LBC/rho

Ref: ID# 29430

cc: Mr. Don Green
United Association of Journeymen and Apprentices
Local No. 196
1505 West 7th Street
Amarillo, Texas 79101

¹A contractor or subcontractor who neglects to keep a record of the names, occupation and actual wages paid to each worker employed by him in connection with the public work, or who refuses to allow access to the records "to any person authorized to inspect same under this Act" is guilty of a misdemeanor. V.T.C.S. art. 5159a, § 5.